

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CARRIE H. DAVIS,)	CASE NO. 3:04CV00075
)	
Plaintiff,)	
)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
)	
JO ANNE B. BARNHART,)	By: B. Waugh Crigler
Commissioner of Social Security,)	U. S. Magistrate Judge
)	
Defendant,)	

This challenge to a final decision of the Commissioner which denied plaintiff's July 16, 2002 claim for a closed period of disability and disability income benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416 and 423, is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report setting forth appropriate findings, conclusions and recommendations for the disposition of the case. The questions presented are whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the undersigned will RECOMMEND that an order enter REMANDING the case to the Commissioner for further proceedings.

In a decision eventually adopted as a final decision of the Commissioner, an

Administrative Law Judge (Law Judge) found that plaintiff met the special earnings requirements of the Act through the date of the decision. (R. 27.) He also determined that the medical evidence established plaintiff suffered the impairments of a right foot bone spur, asthma, and musculoskeletal chest pain, which were severe but which did not meet or equal the requirements of any listed impairment, as well as suffering depression which was found not to impose more than a minimal limitation. (R. 21, 24, 27.) Further, the Law Judge did not find plaintiff's allegations concerning the limitations from her impairments to be credible, and found that she retains "the residual functional capacity to perform sedentary work activity." (R. 27.) Finding plaintiff's past relevant work as a postal clerk did not require the performance of work-related activities precluded by her residual functional capacity, the Law Judge concluded that plaintiff was not prevented from performing her past relevant work. (R. 26-27.) Accordingly, he found plaintiff not disabled under the Act. (R. 27.)

While the case was on administrative appeal to the Appeals Council, plaintiff submitted additional evidence. (R. 275-276.) The Appeals Council summarily concluded that neither the additional evidence nor the record as a whole did not provide a basis for granting a request for review. (R. 6-8.) Thus, the Appeals Council adopted the Law Judge's decision as a final decision of the Commissioner, and this action ensued.

The Commissioner is charged with evaluating the medical evidence, assessing symptoms, signs, and findings, and, in the end, determining the functional capacity of the claimant. 20 C.F.R. §§ 404.1527-404.1545; *Hays v. Sullivan*, 907 F.2d 1453 (1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). In that connection, the regulations grant the Commissioner some latitude in resolving inconsistencies in evidence and the court reviews the Law Judge's factual determinations only

for clear error. 20 C.F.R. §§ 404.1527 and 416.927; *See also Estep v. Richardson*, 459 F.2d 1015, 1017 (4th Cir. 1972). In the end, if the Law Judge’s resolution of the conflicts in the evidence is supported by substantial evidence then the Commissioner’s final decision must be affirmed. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

On the other hand, it is axiomatic that courts may remand a case to the Commissioner for the further development of the evidence where “good cause” has been shown. 42 U.S.C. § 405(g). What constitutes “good cause” draws beyond the boundaries of the substantive merits of the claim as presented in the record and is not constrained by whether the Commissioner’s decision might have been supported by substantial evidence at the time of judicial review. *Walker v. Harris*, 642 F.2d 712, 714 (4th Cir. 1981). Failure to provide “a full and fair hearing... and the failure to have such a hearing may constitute good cause sufficient to remand to the [Commissioner] under 42 U.S.C. § 405(g) for the taking of additional evidence.” *Sims v. Harris*, 631 F.2d 26, 27 (4th Cir. 1980).

In that connection, the Appeals Council must consider new and material evidence offered on administrative appeal, so long as that evidence is relevant to the period under consideration. 20 C.F.R. § 416.1470(b) (1999); *Wilkins v. Secretary*, 953 F.2d 93, 95 (4th Cir. 1991); *Riley v. Apfel*, 88 F. Supp. 2d 572 (W.D.Va. 2000). Evidence is “new” within the meaning of the regulations if it is not duplicative or cumulative, and evidence is “material” if there is a reasonable possibility that the new evidence would have changed the Commissioner’s decision. *See, Wilkins*, 953 F.2d at 96; *Borders v. Heckler*, 777 F.2d 954, 956 (4th Cir. 1985).

Further, when evidence is offered to the Appeals Council on administrative appeal, the Council has a duty to do more than offer scant discussion of it. *Riley v. Apfel*, 88 F. Supp. 2d 572 (W.D. Va. 2000). The Council has a duty to make specific findings regarding the weight it has given

the new evidence. Where it fails to do so, and where the evidence does not otherwise compel a court to enter judgment as a matter of law on the record before it, thus rendering the purpose of a remand unnecessary, the better practice is for a reviewing court to send the case back for further proceedings in order to give the Commissioner an opportunity to make findings of fact that can be meaningfully assessed under 42 U.S.C. §405(g).

One of plaintiff's contentions here is that the Appeals Council improperly failed to take new evidence into account. The evidence in question is a note from plaintiff's treating physician, Dr. Hurwitz, clarifying evidence in the medical record. The Law Judge discounted plaintiff's statement that she had been medically directed to keep her leg elevated for several hours a day, finding "no indication in the medical records of this recommendation." (R. 25.) The Law Judge used this discrepancy as a basis on which to support his finding that the plaintiff was not entirely credible. (*Id.*) Moreover, at the hearing the VE testified that, were there a "need to elevate their foot for two to three hours during normal work hours at least waist level," an individual would be unable to do any job at the competitive level. (R. 300.)

The medical evidence from Dr. Hurwitz submitted to the Appeals Council add an important factor to consider in determining the weight to be given the evidence in this case, namely, that plaintiff was medically required to keep her food elevated "frequently throughout the day." (R. 276.) Under *Riley*, a remand would afford the Commissioner an opportunity to make more informed findings of fact which then could be meaningfully assessed on judicial review under 42 U.S.C. §405(g). Good cause has been presented to remand this case for further proceedings.

Therefore, the undersigned RECOMMENDS that an order enter REMANDING the

case for further proceedings. The order of remand should direct that, in the event the Commissioner cannot grant benefits on the current record, she is to recommit the case to a Law Judge to conduct supplemental proceedings in which both sides may introduce additional evidence.

The Clerk is directed to immediately transmit the record in this case to the presiding District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U. S. Magistrate Judge

Date